A

MAJLIS PERBANDARAN KLANG

v.

GENERATION PRODUCTS SDN BHD

B

COURT OF APPEAL, PUTRAJAYA
MOKHTAR SIDIN JCA
MOHD GHAZALI YUSOFF JCA
NIK HASHIM JCA
[CIVIL APPEAL NO: B-02-645-1997]

C

5 MAY 2006

LIMITATION: *Charge - Claim by local authority for arrears of rates under s. 268 National Land Code - Whether an action or proceeding to which Limitation Act 1953 applies*

D

LOCAL GOVERNMENT: *Rates - Arrears of assessment - Penalty - Whether penalty may be imposed as a percentage on the arrears*

LOCAL GOVERNMENT: *Rates - Arrears of assessment - Costs - Whether expenses incurred in recovering unpaid rates can be fixed at a*

E

percentage of arrears

LOCAL GOVERNMENT: *Legislation - Challenging statutory power exercised by local authority - Requirement of bad faith, mistake in construing limits of power, procedural irregularity, unreasonableness*

F

The appellant was the rating authority for the Klang Municipal District under the Local Government Act 1976 ("the Act"). The respondent was the owner of two pieces of land located within the Klang Municipal District. Upon auction of the two pieces of land by the chargee bank, the appellant claimed the full amount

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of arrears of the rates and penalty assessed from 1985 to 1994. The respondent disputed the amount recovered by the appellant on the ground of the computation of the rates, the imposition of penalties and the fee. The appellant fixed the penalty at 2% of the rate until 1991 and from 1992 onwards the penalty was fixed at

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10%. The fee which was the cost of attachment was fixed by the appellant at a flat rate of 10% of the outstanding rate. Being dissatisfied with the amount collected by the appellant, the respondent filed an originating summons seeking the following declarations: (a) that under s. 147(1) of the Act, the assessment

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remaining unpaid may be subjected only once to the fee that the local authority may fix; (b) that it was *ultra vires* for the local authority to impose a late penalty by way of a percentage of the

unpaid rate as a fee under s. 147(1) of the Act; (c) that the 'fee' that the local authority may fix under s. 147(1) must represent the cost of the additional services if any incurred and not arbitrarily fixed; (d) that pursuant to s. 148 upon the issuance of a warrant for attachment for recovery of arrears the 'fee' that the local authority may fix from time to time must represent the actual costs of attachment incurred and must not be based on the quantum of the arrears.

The court allowed the respondent's application and vacated the assessments, the penalties and the fee. The appellant appealed claiming that in the court below the respondent was wrong in contending that: (a) the recovery was time barred under s. 6(4) of the Limitation Act 1953 ('the LA') as it was recovery of a penalty sum outside the one year period; (b) the fee may be imposed only once under s. 147(1), that it cannot be a percentage of the unpaid rate but should reflect actual cost; and (c) as regards s. 148(4), the levy cannot be a flat rate of 10% but must be actual costs of attachment.

Held (allowing the appeal with costs)
Per Mokhtar Sidin JCA:

(1) The local authority is not involved in the court proceedings to sell and the sale. The local authority have only to demand the amount due and it will be paid because of the provisions of s. 268 of the National Land Code. That was precisely what happened in the present appeal. The appellant did not do anything except to demand. There was no action or proceeding by the appellant to which the LA applied. The learned judge was in error in coming to the conclusion that the LA applied in the present appeal. (para 10)

(2) If the penalty remains the same throughout, the penalty is meaningless and will not be a deterrent because the penalty once imposed on the rate would remain the same. The whole idea of imposing the penalty is to be a deterrent. There was no penalty upon penalty. As such there was no merit in the contention of the respondent. The penalty was imposed on the arrears (excluding penalty) remaining unpaid for that half. (para 12)

(3) From 1/92 the penalty rate was amended to 10%. The appellant imposed the 10% penalty not only for the rate unpaid for 1/92 but also for the previous arrears remaining

unpaid. The appellant made an error on this. The penalty for those arrears should remain at the rate of 2% until it is finally paid. The rate of 10% penalty was only applicable to the rate and arrears beginning 1/92. (para 13)

(4) "Fee" in the present appeal was the costs incurred in recovering the unpaid rates and the arrears. The appellant is the sole authority to fix the fee. The appellant could, if it wished, fix the "fee" on the actual costs or disbursements to recover the sum due or fix a standard rate for all ratepayers. Here, the appellant chose the latter in that the "fee" was fixed at a percentage of unpaid amount and arrears. Section 147(1) gives such right to the appellant. The respondent could only challenge the fixed "fee" if it could be shown that it was so unreasonable. There is nothing wrong with the method adopted by the appellant which was applicable to all ratepayers. (para 14)

(5) Where a statute gives the power to an authority and the authority exercises that power, the power could only be challenged by showing bad faith, a mistake in construing the limits of the power, a procedural irregularity or unreasonableness. In the present appeal, the appellant was empowered to fix the "fee". There was nothing to show that the fixed "fee" was made in bad faith, a mistake in construing the limits of the power or unreasonable. (para 17)

Bahasa Malaysia *translation of headnotes*

Perayu adalah pihak berkuasa kadaran bagi Daerah Perbandaran Klang di bawah Akta Kerajaan Tempatan 1976 ('Akta tersebut'). Responden adalah pemilik dua bidang tanah yang terletak di dalam bidangkuasa Daerah Perbandaran Klang. Lanjutan daripada pelelongan kedua-dua bidang tanah tersebut oleh bank pemegang gadaian, perayu telah menuntut jumlah penuh bayaran kadaran yang tertunggak serta penalti yang dikira dari tahun 1985 hingga 1994. Responden telah mempertikaikan amaun yang dituntut oleh perayu atas alasan perkiraan kadaran tersebut, pengenaan penalti dan yuran yang dikenakan. Perayu telah menetapkan penalti pada kadar 2% atas kadaran sehingga 1991 dan mulai dari 1992 penalti tersebut telah ditetapkan pada kadar 10%. Yuran yang merupakan kos penyitaan telah ditetapkan oleh perayu pada kadar tetap 10% daripada kadaran yang tertunggak. Tidak berpuas dengan amaun yang dikutip oleh perayu, responden telah memfailkan satu Saman

Pemula menuntut deklarasi-deklarasi berikut: (a) bahawa di bawah s. 147(1) Akta tersebut, kadaran yang masih belum dibayar hanya boleh dikenakan sekali sahaja yuran yang ditetapkan oleh pihak berkuasa tempatan; (b) bahawa adalah ultra vires untuk pihak berkuasa tempatan mengenakan penalti kelewatan secara satu peratusan ke atas kadaran yang tertunggak sebagai yuran di bawah s. 147(1) Akta tersebut; (c) bahawa 'yuran' yang boleh ditetapkan oleh pihak berkuasa tempatan di bawah s. 147(1) mesti bersamaan dengan kos perkhidmatan tambahan, jika ada, yang telah dialami dan bukan ditetapkan secara arbitrari; (d) bahawa lanjutan daripada s. 148 selepas pengeluaran waran untuk penyitaan bagi menuntut tunggakan, "yuran" yang boleh ditetapkan oleh pihak berkuasa tempatan dari masa ke semasa mesti bersamaan dengan kos penyitaan yang sebenarnya dialami dan tidak boleh didasarkan pada kuantum tunggakan.

Mahkamah telah membenarkan permohonan responden dan telah membatalkan taksiran, penalti serta yuran tersebut. Perayu telah merayu atas alasan bahawa di mahkamah di bawah responden telah salah dalam berhujah bahawa: (a) tuntutan itu telah dihalang oleh had masa di bawah s. 6(4) Akta Had Masa 1953 kerana ianya merupakan tuntuan bagi satu penalti di luar tempoh masa satu tahun; (b) bahawa yuran tersebut hanya boleh dikenakan sekali sahaja di bawah s. 147(1), dan bahawa ianya tidak boleh menjadi satu peratusan ke atas tunggakan kadaran tetapi mesti mencerminkan kos sebenar; dan (c) berkenaan dengan s. 148(4), levi yang dikenakan itu tidak boleh menjadi satu kadar tetap sebanyak 10% tetapi mestilah kos sebenar penyitaan.

Diputuskan (membenarkan rayuan dengan kos)
Oleh Mokhtar Sidin HMR:

(1) Pihak berkuasa tempatan tidak terlibat di dalam prosiding mahkamah untuk menjual dan di dalam penjualan itu. Pihak berkuasa tempatan hanya perlu menuntut amaun yang terakru dan ianya akan dibayar kerana peruntukkan s. 268 Kanun Tanah Negara. Inilah apa yang telah berlaku di dalam rayuan ini. Perayu tidak membuat apa-apa selain daripada membuat tuntutan. Tidak ada tindakan atau prosiding oleh perayu kepada yang mana Akta Had Masa terpakai. Hakim yang bijaksana telah khilaf dalam memutuskan bahawa Akta Had Masa terpakai di dalam rayuan ini.

(2) Sekiranya penalti kekal sama pada sepanjang masa, penalti itu akan menjadi tidak bermakna dan tidak akan menjadi satu pencegahan kerana penalti itu sekali dikenakan pada kadaran akan kekal sama. Tujuan mengenakan penalti ialah supaya ia akan menjadi satu pencegahan. Tidak ada penalti di atas penalti. Oleh itu, tidak ada merit di dalam hujahan responden. Penalti itu telah dikenakan ke atas tunggakan (tidak temasuk penalti) yang masih belum dibayar untuk setengah tahun itu.

(3) Dari 1/92 kadar penalti telah dipinda ke 10%. Perayu telah mengenakan 10% penalti itu bukan sahaja kepada kadaran yang tertunggak untuk 1/92 tetapi juga kepada tunggakan sebelum itu yang masih belum dijelaskan. Perayu telah tersilap dalam perkara ini. Penalti untuk tunggakan-tunggakan itu mesti kekal pada kadar 2% sehingga ianya dibayar sepenuhnya. Kadar penalti 10% hanya terpakai kepada kadaran dan tunggakan bermula 1/92.

(4) "Yuran" dalam rayuan ini adalah kos yang dialami dalam menuntut kadaran yang belum dibayar dan tunggakan-tunggakan. Perayu adalah pihak berkuasa tunggal untuk menetapkan yuran tersebut. Perayu boleh, jika ia berniat sedemikian, menetapkan "yuran" tersebut berdasarkan kos sebenar atau perbelanjaan yang dialami dalam menuntut jumlah terhutang atau menetapkan satu kadar yang tetap untuk semua pembayar kadaran. Di sini, perayu telah memilih kaedah yang terkemudian itu iaitu "yuran" tersebut telah ditetapkan pada suatu peratusan ke atas jumlah yang belum dibayar dan tunggakan-tunggakan. Seksyen 147(1) memberikan hak sedemikian kepada perayu. Responden hanya boleh mempertikaikan "yuran" tetap itu sekiranya dapat ditunjukkan bahawa ianya adalah sangat tidak munasabah. Tidak ada apa-apa salah dengan kaedah yang digunapakai oleh perayu yang mana telah digunakan bagi semua pembayar kadaran.

(5) Di mana sesuatu Akta memberikan kuasa kepada sebuah pihak berkuasa dan pihak berkuasa itu menggunakan kuasa itu, kuasa itu hanya boleh dicabar dengan menunjukkan niat jahat, kekhilafan dalam menetapkan had kuasa tersebut, kejadian luar aturan prosedur atau ketidakmunasabahan. Dalam rayuan ini, perayu telah diberi kuasa untuk menetapkan "yuran" tersebut. Tidak ada apa-apa yang menunjukkan bahawa "yuran" tetap itu telah dibuat dengan niat jahat, secara kekhilafan dalam menetapkan had kuasa atau secara tidak munasabah.

Case(s) referred to:

Associated Provincial Picture Houses, Limited v. Wednesbury Corporation [1948] 1 KB 223 ***(refd)***

China v. Harrow Urban District Council [1953] 2 All ER 1296 ***(refd)***

Dilworth & Ors v. The Commissioner of Stamps [1899] AC 99 ***(refd)***

Merdeka University v. Government of Malaysia [1982] 2 MLJ 243 ***(refd)***

Puhlhofer & Anor v. Hillingdon London Borough Council [1986] 1 AC 484 HL ***(refd)***

Legislation referred to:

Limitation Act 1953, ss. 2(1), 6(4)

Local Government Act 1976, ss. 146, 147(1), 148(4), 149, 150, 151, 152

National Land Code, s. 268(1)

Sunday Entertainments Act 1932 [UK], s. 1(1)

For the appellant - Cyrus Das; M/s Fernandez & Co

For the respondent - DP Vijandran; M/s Gill & Tang

[Appeal from High Court, Shah Alam; Originating Summons No: MT1-24-743-94]

Reported by Amutha Suppayah

JUDGMENT

Mokhtar Sidin JCA:

[1] The appellant, a local authority, is also the rating authority for the Klang Municipal District under the Local Government Act 1976 ("the Act"). The respondent is the owner of two pieces of land located within the Klang Municipal District and a ratepayer under the Act. For those two pieces of land the respondent was in arrears of the rates assessed from 1985 to 1994. It is not disputed that assessments raised were on the basis of half-yearly. It is also not disputed that the two pieces of land were charged to a financial institution.

[2] In July 1994, the two pieces of land was sold through a public auction by the financial institution. As provided by s. 268(1) of the National Land Code, the appellant recovered the full amount of arrears and penalty due from the respondent. The respondent disputed the amount recovered by the appellant on the ground of the computation of the rates, the imposition of penalties and the fee. It is not disputed that the appellant fixed the penalty

at 2% of the rate until 1991 and from 1992 onwards the penalty was fixed at 10%. The fee which was the cost of attachment was fixed by the appellant at a flat rate of 10% of the outstanding rate.

[3] Being dissatisfied with the amount collected by the appellant from the financial institution, the respondent filed an originating summons dated 6 September 1994 seeking the following declarations:

(a) that by a true construction of section 147(1) of the Local Government Act 171 the assessment payable half yearly in advance in accordance with section 133 (if any), remaining unpaid at the end of February or August as the case may be, may be subjected to only once to the fee that the local authority may fix, whereupon such unpaid amount may be recoverable in accordance with section 148;

(b) that it is *ultra vires* for the local authority to impose a late penalty by way of a percentage of the unpaid rate as a fee under section 147(1) of the Act;

(c) that the 'fee' that the local authority may fix from time to time under section 147(1) must represent the cost of the additional services if any incurred and not arbitrarily fixed;

(d) that pursuant to section 148 upon the issuance of a warrant for attachment for recovery of arrears the 'fee' that the local authority may fix from time to time must represent the actual costs of attachment incurred and must not be based on the quantum of the arrears and ought not in any event to exceed the fees of attachment of property chargeable by the Sheriff's Office under the Rules of the High Court 1980 and the Courts of Judicature Act 1964;

(e) that it is *ultra vires* and unlawful for the local authority to keep accruing the unpaid assessments and imposing on such accruals at the end of February and at the end of August a charge of 10% by way of late penalty;

(f) that the Notices of Assessments for the years 1992 to 1994 as issued by the defendant be declared as null and void.

The court below allowed the respondent's application and vacated the assessments, the penalties and the fee. Being dissatisfied with the decision of the learned judge the appellant appealed to this court.

[4] Before us, the learned counsel for the appellant submitted that in the court below the respondent was wrong in contending that:

(a) the recovery was time barred under s. 6(4) of the Limitation Act 1953 as it was recovery of a penalty sum outside the one year period;

(b) the fee may be imposed only once under s. 147(1), that it cannot be a percentage of the unpaid rate but should reflect actual cost; and

(c) as regards s. 148(4), the levy cannot be a flat rate of 10% but must be actual costs of attachment.

The appellant's counsel further submitted that the learned trial judge was in error when he accepted the respondent's contentions and struck down the notices of assessments, the penalties and the fee imposed. The three points will be dealt with in two broad points.

The Limitation To Recover Penalties

[5] Before us, the appellant contended that s. 6(4) of the Limitation Act 1953 applies only to "an action" as defined in s. 2 of the same Act. Section 6(4) reads:

> 6(4) An action to recover any penalty or forfeiture or sum by way of penalty or forfeiture recoverable by virtue of any written law shall not be brought after the expiration of one year from the date on which the cause of action accrued:
>
> Provided that for the purpose of this subsection the expression "penalty" shall not include a fine to which a person is liable on conviction for a criminal offence.

The word "action" as defined in s. 2(1) reads:

> 2(1) In this Act, unless the context otherwise requires:
>
> "action" includes a suit or any other proceeding in a court of law;

The appellant's counsel submitted that the recovery by the appellant of the rates and the penalties in the present appeal were not by way of an action as defined by s. 6(4) of the Limitation Act. The recovery in the present appeal was under ss. 147 and 148 of the Act which provide as follows:

147. Proceedings in default

(1) If any sum payable in respect of any rate remains unpaid at the end of February or August, as the case may be, the owner or owners shall be liable to pay the same together with such fee as the local authority may fix from time to time.

(2) If any such sum or any part thereof remains due and unpaid by the end of February or by the end of August in each year, as the case may be, it shall be deemed to be an arrear and may be recovered as provided in section 148.

148. Proceedings for recovery of an arrear

(1) For the recovery of an arrear the local authority may issue a warrant of attachment in Form F of the First Schedule hereto and may seize by virtue thereof any movable property, belonging to the owner or occupier liable to pay the same, which is found within the local authority area and may also seize any movable property, to whomsoever belonging, which is found on the holding in respect of which the arrear is due:

Provided that no warrant of attachment shall be issued by the local authority unless it has served a notice, in Form E of the First Schedule hereto, posted or delivered to the owner or any one of the owners, if more than one, at the last known address, calling on him to pay the arrear within fifteen days of the posting or delivery.

(2) The warrant shall be executed by an officer of the local authority who shall make an inventory of the property attached thereunder, and shall at the same time give notice in Form G of the First Schedule hereto, to the person in possession of the property at the time of attachment:

Provided that where in the opinion of the officer executing the warrant the value of the moveable property to be attached is of a lesser value than the arrear to be recovered or there is no moveable property to be attached as in the case of a holding which is vacant or unoccupied no such inventory need be made and in such a case he shall affix a notice in Form H of the First Schedule hereto on some conspicuous part of the holding or any one of the holdings in respect of which the arrear is due to the effect that procedure for the recovery shall be instituted under section 151.

(3) Such officer may break open in the daytime any house or building for the purpose of effecting such attachment.

(4) The fee for a warrant of attachment shall be of such amount as the local authority may fix from time to time and shall be costs of the attachment.

The appellant's counsel further submitted that the recovery in the present appeal was through a statutory procedure provided for under s. 268(1)(a) of the National Land Code without recourse to any legal action or legal proceedings in court. Section 146 of the Act gives the appellant the priority over others, by deeming that the appellant has the first charge to any immovable property within its jurisdiction when the ratepayer is in arrears for rates, penalties and fees imposed. Section 146 of the Act provides:

146. Rates to be first charge

All rates shall be paid by the persons who are the owners of the holdings for the time being, and until so paid shall, subject to the provisions of the National Land Code, be a first charge on the holdings in respect of which they are assessed, and if not paid within the prescribed time, shall be recoverable in the manner hereinafter prescribed.

The learned judge in his judgment stated as follows:

Thus section 6(4) of the Limitation Act 1953 which says that "an action to recover any penalty or forfeiture of sums by way of penalty or forfeiture recoverable by virtue any written law shall not be brought after the expiration of one year from the date on which the cause of action accrues" is applicable to this case. There is no doubt that the local council impose a penalty on the overdue rates is in the form of a fee. There is no doubt that the right of the local council to collect this penalty/fee is provided by written law i.e. the Local Government Act 1976. The date on which the cause of action/proceeding accrues is the date of demand i.e. the date on which the Notice of Assessment were issued by the defendant to the plaintiff.

By virtue of section 6(4) of the Limitation Act 1953 an action/proceeding to recover the penalty/fee can only be brought within one (1) year from the date the cause of action/proceeding accrued. So it is clear from this that the penalty fee for the outstanding half (1/2) yearly assessment can only be recovered within twelve (12) months from the date the assessment itself becomes due. This provided for by section 147 of the Local Government Act 1976 itself which says "(1) – If any sum payable in respect of any rate remains unpaid at the end of February or August as the

A case may be, the owner or owners shall be liable to pay the same together with such fee as the Local Authority may fix from time to time. Section 147(2) provides; – If any such sum or any part … therefore remains due and unpaid by the end of February or by the end of August in each year, as the case may be, it shall be deemed to be an arrears and may be recovered as provided in section 148.

As stated in *China v. Harrow Urban District Council* (1953) case, 'a cause of proceeding accrues when a ratepayer fails to pay on demand a rate duly made and published in respect of which he has been assessed. (See Para G to H on page 1302 of *China*'s case).

So it is clear that time for the purposes of section 6(4) of the Limitation Act 1953 starts running from the date on which a demand is made, i.e. the date on which the Notice of Assessment detailing the outstanding assessment for that period were issued by the defendant and published to the plaintiff.

Therefore a cause of action accrues when you have an identified plaintiff, an identified defendant and all the facts have happened which are material to be proved to entitle the plaintiff to succeed. See *Credit Corporation (M) Bhd v. Fong Tak Sin* [1991] 1 MLJ 409 (specifically to Held 1 Page 409).

Thus in this case once the outstanding rate become an arrear as defined in section 147(2) of the Local Government Act 1976, a cause of action accrued. Hence the defendant's claim for the penalty/fee prior to the 2nd half assessment of 1993 is time barred by virtue of section 6(4) of the Limitation Act 1953.

[6] Before us, learned counsel for the respondent submitted that the limitation issue raised is only an alternative issue. He went on to submit that the word "action" in the Limitation Act includes a suit or any proceeding in a court of law. The term "includes" in the definition is of significance. It widens the definition to all things normally included under the word "action" and as such it is not restricted to "a suit or proceeding in a court of law" only. The respondent's counsel then referred to *Merdeka University v. Government of Malaysia* [1982] 2 MLJ 243 where the term "includes" is said to encompass "such things as they signify according to their natural import". He went on to say that the normal meaning of the word "action" would encompass any legal action or process regardless of whether such action is in court of law or not. The word "action" in s. 2 of the Limitation Act, because of the presence of the word "includes", is open-ended.

[7] In reply, the appellant's counsel disputed the respondent's submission that the limitation issue is an alternative issue raised by the respondent. He went on to say that limitation was the principal issue raised by the respondent in the court below, and the learned trial judge allowed the respondent's application on the basis of limitation. He contended that the interpretation given by learned counsel for the respondent and accepted by the learned judge led to absurdity in that steps taken by a creditor to recover any amount from a debtor without involving the court would be classified as an "action". The word "includes" found in the definition of "action" should not be read to enlarge the meaning of action. The definition of "action" in s. 2 should be confined to any form of court proceedings including a suit as contained therein. He then cited the Privy Council decision in *Dilworth & Ors v. The Commissioner of Stamps* [1899] AC 99 at 106 where Lord Watson explained that the word "includes" in a statutory definition would not in all cases enlarge the meaning but could in its statutory context mean the thing further described in which case it is exhaustive.

[8] We are in agreement with the appellant that the word "includes" in the definition of "action" is not capable of being enlarged. In our view the definition of the word "action" in s. 2(1) refers only to proceedings or suits in a court of law. This is strengthened by the fact that limitation could only be raised as a defence.

[9] The trial judge in his judgment relied heavily on the case of *China v. Harrow Urban District Council* [1953] 2 All ER 1296. In that case the appellant was in arrear in respect of rates of previous years amounting to £26 15s. 4d. and he became liable for a proportion of a further half-year's rate amounting to £4 8s. 9d. in respect of his occupancy of the rated hereditament between 1 April and 5 July 1940, when he ceased to be the occupier. No action was taken by the respondent against the appellant at that time because the appellant was on war service, or for some time after that, because the appellant's whereabout was not known. Having ascertained the appellant's whereabout, in February 1953, the respondent made a further demand for payment from the appellant. In March, the respondent preferred a complaint against the appellant with a view of obtaining a distress warrant against the appellant, which was eventually granted. It was not disputed that the distress warrant sought and obtained was in respect of

A arrears of more than six years and in some cases 15 years ago. The issue before the court was whether the limitation period applied to the distress action. At p. 1298, Lord Goddard CJ said:

> The question whether there is any period of limitation for the
B recovery of rates is entirely destitute of authority, which, perhaps, is not surprising. It is hardly likely that any local authority has ever before sought to take proceedings after such a length of time, and it must, I think, be conceded that before July 1, 1940, when the Limitation Act, 1939, came into force, it could not have been argued that there was a period of limitation. The Limitation
C Act, 1623 (21 Jac. 1, c. 16) sets out in terms [in s. 3] the various personal actions to which it applies. They are actions on the case, other than for slander, actions of account, trespass quare clausum fregit, debt, detinue and replevin, for all of which six years is the period named, and actions for assault, other cases of
D trespass to the person, and slander, for which shorter periods are named. Proceedings for the recovery of rates have always been regarded as a class apart. It is settled that no action lies for their recovery, and that the only method is that laid down in the Poor Relief Act, 1601 (43 Eliz. c. 2), s. 2, namely, by application to justices for a distress warrant: see *Liverpool Corpn. v. Hope* (3).
E None the less, arrears of rates are a debt, and one must not confuse the debt with the remedy: see *Lloyd v. Heathcote* (4) and *Re McGreavy* (5). The remedy of distress is only a special procedure for dealing with dafaulting ratepayers. Other matters which have been decided with reference to these proceedings are
F that a demand is a necessary preliminary to the application for a warrant (*Davis v. Burrell* (6)), and that, though the time limit of six months within which proceedings must be taken before courts of summary jurisdiction [under the Summary Jurisdiction Act, 1848, s. 11] applies to such proceedings for the recovery of civil debts as those courts can entertain (*Mackie v. Fox* (7)), this
G limitation does not apply to those for the recovery of rates: see *R. v. Price* (8).

> As I have already said, it would have been impossible to contend that the Limitation Act, 1623, applied to this class of proceeding and the court has now to determine for the first time whether the
H Act of 1939 has applied a period of limitation. Not only is there no authority on this question but there is no communis opinio among text writers. The learned editors of *Faraday On Rating*, 5th ed., at p. 330, are of opinion that the Act does apply, while the equally learned editors of *Ryde On Rating*, 9th ed., at p. 812,
I express a contrary opinion, though, if I may so, the cases they cite in support of their opinion do not really assist. All they show

is that rates may be recovered after the year for which they have been made. I, therefore, turn to the provisions of the Act of 1939. Section 2(1) enacts

> The following actions shall not be brought after the expiration of six years from the date on which the cause of action accrued …

Among those enumerated are:

> (d) actions to recover any sum recoverable by virtue of any enactment, other than a penalty or forfeiture or sum by way of penalty or forfeiture.

If that sub-section stood alone, it is clear that, as no action lies for the recovery of rates (*Liverpool Corpn. v. Hope* (3)). It would follow that it has no application. It is unnecessary to burden this judgment by referring to the numerous decisions as to the meaning of "action", as, for the purposes of the Act, the word is defined by s. 31(1) as including "any proceeding in a court of law, including an ecclesiastical court", unless the context otherwise requires. It is not, in my opinion, open to doubt that an application for a distress warrant is a proceeding in a court of law. The *dicta* of Cockburn, CJ, in *Sweetman v. Guest* (9) and *R. v. Price* (6), that justices are, in such a matter, acting ministerially, and not judicially, has not been followed. In *Potts v. Hickman* (1) Viscount Simon LC, said ([1940] 4 All ER 495) that "justices, when granting a distress warrant for rates, are proceeding judicially." Lord Wright said (*ibid.*, 506) that an order for a warrant of distress was made in a judicial proceeding, and (*ibid.*, 508) that the *dictum* of Cockburn, CJ, in *R v. Price* (8), could not be supported as a statement of the general law. He added *(ibid.):*

> Even if the party summoned has no valid objection which he can raise to being rated because the facts are clear, the justice still acts judicially in making the particular order of distress, even though no other course is open to him judicially.

The cases show that the rate itself constitutes an order to pay. Though, as I have already said, they also lay down that proceedings to enforce payment cannot be commenced until there has been a demand and subsequent default. On the hearing of the application proof is required of the service of the summons, that the sum mentioned, and that it has been demanded and not paid [: see Distress for Rates Act, 1849, s. 5, s. 8, and schedule, Form C1]. Various defences are open to the person summoned which it is unnecessary to detail. In my opinion, therefore, it is clear that there is here a "proceeding in a court of law." Does,

A therefore, the context require a different interpretation so that this particular proceeding does not come within the definition in s. 31(1) of the Act of 1939? Counsel for the rating authority submitted that some limitation must be placed on the wide words of the definition. He said that they could not include, for instance, criminal proceedings. That is true, but criminal cases, clearly, do not fall within s. 2 which refers to proceedings for the recovery of money, nor within any other section of the Act. The penalties excluded by the section are, in my opinion, those for which what is known as a penal action can be brought. But the words of the definition show that it is intended to bring within the scope of the section proceedings to which the term "action" would be inapplicable.

… Limitation of actions is imposed by positive law and courts can only refuse to enforce claims on the ground of lapse of time if there is an appropriate provision to be found in the Act, but I see no good reason for unduly limiting words which can apply to a particular case as courts always lean against stale claims. The Act of 1939 is not merely a consolidating statute. Its title shows it to be one consolidating and amending the law, and, in my opinion, the very wide terms of the definition of "action" in s. 31(1) show that s. 2(1)(d) of the Act was intended to apply to all money claims made in a court. This view, I think, is to some extent strengthened by the inclusion of ecclesiastical courts in the definition section (s. 31(1)). …

Sellers J at p. 1300 said:

The definition in the Act of 1939 was, obviously, intended to enlarge the more normal meaning of "action", and I do not think the context of s. 2(1) does require that the definition of "action" should not be applied to it. If the definition is applied, then the sub-section should be read to provide that the following proceedings in a court of law shall not be brought after the expiration of six years from the date on which the cause of proceedings in a court of law accrued, that is to say, (d) proceedings in a court of law to recover any sum recoverable by virtue of any enactment. …

Havers J at p. 1302 said:

The form of the distress warrant, which was set out in the schedule to the Distress for Rates Act, 1849, indicates the various matters which have to be proved by the rating authority and found by the justices before they can issue a distress warrant. There are also various matters which it is open to the person summoned to raise by way of objection. At one time the view

was held that in such proceedings the justices were acting ministerially and not judicially: see *Sweetman v. Guest* (9) and *R v. Price* (8). However, since *Potts v. Hickman* (1), it cannot, in my opinion, now be successfully contended that an order for a warrant of distress is not made in a judicial proceeding or that justices are not acting judicially in making an order. In my opinion, an application for a distress warrant is a proceeding in a court of law. Is there any compelling reason why the context should require that these particular proceedings should not be included within the definition? In my opinion, it is clear that proceedings for the recovery of rates do not fall within the category of personal actions mentioned in s. 3 of the Limitation Act, 1623, or within any other Limitation Act which was in force prior to the Act of 1939. It is, perhaps, somewhat surprising that, if it was intended to make a change in the law for the first time since 1601 by imposing a limitation of time on proceedings for the recovery of rates, clearer language, specifically referring to rates, should not have been used in s. 2 of the Limitation Act, 1939. The Act of 1939 is, however, an amending as well as a consolidating Act, and, as the language used in s. 2(1)(d) and s. 31(1) is apt to cover an application to justices for the issue of a distress warrant for arrears of rates, I see no good reason why such proceedings should be excluded. My view is strengthened by a comparison between the definition of "action" in s. 225 to the Supreme Court of Judicature (Consolidation) Act, 1925, and in s. 31(1) of the Limitation Act, 1939. In the former, "action" means

> a civil proceeding commenced by writ or in such other manner as may be prescribed by rules of court, but does not include a criminal proceeding by the Crown.

The wide words of the definition in the Limitation Act, 1939, show that it was intended to bring within the ambit of s. 2 proceedings to which the term "action" would not normally be appropriate.

It remains to consider the meaning of "cause of action", if "action" is to be considered as including proceedings for the recovery of rates. If the word "action" is to embrace proceedings which are not actions in the ordinary sense, "cause of action" should, in my view, be read as "cause of proceeding". The cause of the proceedings, in my opinion, accrues when a ratepayer fails to pay on demand a rate duly made and published in respect of which he has been assessed, and the period of six years in which the proceedings must be taken would run from the failure to pay on demand. …

With the greatest respect to the learned judge and the respondent's counsel, the court in the above case was asked to decide whether the summons for a distress warrant before the justices in the County of Middlesex was proceedings in a court of law to which the Limitation Act applied. The court was of the view that the word "action" was to embrace proceedings which were not actions in the ordinary sense, in the ordinary sense "cause of action" be read as "cause of proceeding". In other words, each proceeding must be viewed in its particular circumstance whether it is an action. The court did not interpret the word "includes" to include all processes of collection and recovery of rates.

[10] Coming back to the present appeal, the Act provides several ways by which the local authority could recover the rates and the arrears. The Act makes specific provision under s. 151 of the Act, as to how the Local Authority (the appellant) could recover rates and arrears by way of proceedings in court. Section 151 provides:

> 151 Attachment and sale of holding
>
> (1) If the arrear cannot be recovered in the manner provided in section 148 it shall be lawful for the Registrar of the High Court upon application made by the local authority, or by any officer of the local authority authorised by the local authority in that behalf, to order the attachment and sale of the holding or holdings in respect of which the arrear has accrued.
>
> (2) Such attachment and sale may be effected in the manner provided by the law relating to civil procedure for the execution of a decree by attachment and sale of immovable property.
>
> (3) The Registrar of the High Court shall, from the proceeds of sale, provide first for the costs of attachment and sale, then for payment to the local authority of the amount of the arrear, together with interest thereon at the rate of six per centum per annum and costs, and in the event of there being any surplus remaining the Registrar shall, if he is satisfied as to the right of any person claiming such surplus, pay the amount thereof to him, and if he is not so satisfied, shall place the amount on deposit in the Treasury to be held in trust for the person who may ultimately succeed in establishing his claim thereto.

The above makes it clear that the local authority could make use of the above to recover the rates and the arrears. Sections 147 and 148 also provide ways to recover the proceedings in court. If the appellant chooses to accept the above, then the respondent would be at liberty to plead limitation because it is an "action" within the definition of s. 2 of the Limitation Act. As pointed out earlier, there are other ways for which the appellant could recover the rates and arrears without the need to go to court and this includes s. 146 of the Act. Section 146 enables the appellant to recover the rates and arrears through statutory provisions under the National Land Code, in particular s. 268(1) of the National Land Code which provides:

> 268 Application of purchase money
>
> The purchase money arising on any sale under this Chapter shall be applied as follows:
>
> (a) firstly, in the payment of rent to the State Authority or the lessor (according as the charge was a charge of land or of a lease) and, so far as no person other than the chargor was responsible therefor, any other outgoings payable to the State Authority or any local authority;
>
> (b) secondly, in the payment of the expenses (as certified by the Registrar of the Court or [Land Administrator], as the case may be) incurred in connection with the making and carrying into effect, of the order for sale;
>
> (c) thirdly, in the payment to the chargee of the total amount due under the charge at the time of the sale;
>
> (d) fourthly, in the case of a charge to secure the payment of an annuity or other periodic sum, in accordance with any provision for the satisfaction of payments subsequently falling due included therein pursuant to paragraph (b) of subsection (2) of section 242; and
>
> (e) fifthly, in the payment off of subsequently charges, if any, in the order of their priority.

Reading s. 146 of the Act and the above reasons, it is clear that the rates, arrears and penalty due to a local authority have first priority over others in respect of a sale of a charged property belonging to a ratepayer. This is in respect of a sale by a third party. It is clear that the local authority is not involved in the court proceedings to sell and the sale. The local authority have only to demand the amount due and it will be paid because of

the provisions of s. 268 of the National Land Code. That was precisely what happened in the present appeal. The appellant did not do anything except to demand. In our view, there was no action or proceeding by the appellant to which the Limitation Act applies. The learned judge was in error in coming to the conclusion that the Limitation Act applies in the present appeal.

The Fee Or Levy Under s. 147(1) And s. 148(4)

[11] The appellant's counsel submitted that ss. 147(1) and 148(4) of the Act give a wide discretion to the local authority to impose levy called "fee". He went on to say that s. 147 uses the words "any sum" rather than the words "any rate" as used in s. 146. The words "any sum" are wider than the words "any rate" because the words "any sum" would include the rate and the arrears. He then cited s. 147(1) and pointed the specific wordings "if any sum remains unpaid ..." it is to be paid "together with ... such fee ...". Section 147(1) of the Act gives the right to the local authority to fix and recover the "fee" which is a penalty for arrears which have not been paid. In the present appeal, the appellant had fixed the penalty at the rate of 2% of the outstanding rate until 1991 and for the year 1992 onwards at the rate of 10%. The appellant disputed the respondent's claim that there was penalty upon penalty. To show that there was no penalty upon penalty a table was submitted for us for reference. In fact the appellant submitted the accounts of each piece of land. We will only refer to only account to show that there was no penalty upon penalty:

Account: 060800087912 On Lot: 6124

Calculation of Late Penalty:

Rate		**Penalty**	
1985	829.20	16.00	(2%)
1/86	825.00		
	1,654.20	34.00	"
2/86	825.00		
	2,479.20	48.00	"
1/87	825.00		
	3,304.20	66.00	"
2/87	825.00		
	4,129.20	82.00	"

1/88	825.00			A
	4,954.20	98.00	"	
2/88	825.00			
	5,779.20	114.00	(2%)	
1/89	825.00			B
	6,604.20	132.00	"	
2/89	825.00			
	7,429.20	148.00	"	
1/90	825.00			
	8,254.20	164.00	"	C
2/90	825.00			
	9,079.20	180.00	"	
1/91	825.00			
	9,904.20	198.00	"	D
2/91	825.00			
	10,729.20	214.00	"	
1/92	25.00			
	11,554.20	1,155.40	(Penalty rate amended to 10%)	E
2/92	825.00			
	12,379.20	1,237.90	"	
1/93	850.25	(Rate amended)		F
	13,229.45	1,322.90	"	
2/93	850.25			
	14,079.70	1,408.00	"	
1/94	850.25			
	14,929.95	1,493.00	"	G
2/94	850.25			
	15,780.20	1,578.00	"	
1/95	850.25			
	16,630.45	1,663.00	(10%)	H
2/95	850.25			
	17,480.70	1,748.10	"	
1/96	850.25			
	18,330.95	1,833.20	"	I
2/96	850.25			
	19,181.20	1,918.20	"	
		16,851.70		

The above table shows that the rates were half-yearly, ie, end of February and end of August. As can be seen from the penalty column, the penalty was not added to the amount of rates and arrears in the second column. The penalty imposed were kept separately. The penalty was imposed every half-yearly on the amount of rates and arrears due at the rate specified and for that reason the amount of penalty will keep on increasing.

[12] The respondent contended that the penalty should remain the same throughout because it was imposed on the rate and that the penalty should only be once. We agree with the appellant that, if the contention of the respondent is to be accepted, then the penalty is meaningless and will not be a deterrent because the penalty once imposed on the rate would remain the same. The whole idea of imposing the penalty is to be a deterrent. As can be seen from the table above, there is no penalty upon penalty. As such there is no merit in the contention of the respondent. The penalty is imposed on the amount of arrears (excluding penalty) remaining unpaid for that half.

[13] The table above also shows that from 1/92 the penalty rate was amended to 10%. The appellant imposed the 10% penalty not only for the rate unpaid for 1/92 but also for the previous arrears remaining unpaid. In our view, the appellant made an error on this. The penalty for those arrears should remain at the rate of 2% until it is finally paid. The rate of 10% penalty is only applicable to the rate and arrears beginning 1/92. For that purpose, separate accounts should be kept for pre 1/92 where the penalty was only 2% and for post 1/92 where the 10% penalty was imposed.

[14] The last issue raised was in respect of the "fee" imposed under s. 147(1) of the Act. It is not disputed that the "fee" in the present appeal is the costs incurred in recovering the unpaid rates and the arrears. It is the contention of the respondent that the "fee" should be confined only to the actual costs or disbursements and should not be a fixed rate peg to the amount due. The appellant, on the other hand, contended that s. 147(1) gives the authority to fix the "fee" as stated in that section, *viz*., "... the owner or owners shall be liable to pay the same together **with such fee as the local authority may fix from time to time**" (emphasis added). The wordings clearly show that the appellant is the sole authority to fix the fee. The appellant could, if it wishes, fix the "fee" on the actual costs or disbursements to

recover the sum due or fix a standard rate for all ratepayers. In the present appeal, the appellant chose the latter in that the "fee" is fixed at a percentage of unpaid amount and arrears. Section 147(1) gives such right to the appellant and we could not find any provision in the Act which restricts that right. In our view, the respondent could only challenge the fixed "fee" if it could be shown that it is so unreasonable. Our observation of the "fee" is that it is not confined to writing letters and sending notices. Sections 148 to 152 of the Act provide the procedure for the appellant to recover arrears and one of them is attachment and sale of moveable property or livestocks or perishable goods. In our view, there are costs incurred and disbursements involved to recover arrears and this would be the rationale for a local authority to fix such fee at a fixed rate rather than the actual costs and disbursements which could vary from one ratepayer to another. We see nothing wrong with the method adopted by the appellant which is applicable to all ratepayers. It is our view that fixing fees for such purpose is not *ultra vires* the Act and is clearly allowed by s. 148(4) of the Act which reads:

> (4) The fee for a warrant of attachment shall be of such an amount as the local authority may fix from time to time and shall be the costs of attachment.

[15] As we have stated earlier, the respondent could challenge the "fee" imposed on them in accordance with the principles stated in *Associated Provincial Picture Houses, Limited v. Wednesbury Corporation* [1948] 1 KB 223. In that case, the plaintiff company, the owners and licensees of the Gaumont Cinema, Wednesbury, Staffordshire, were granted by the defendants who were the licensing authority for that borough under the Cinematograph Act 1909, a licence to give performances on Sunday under s. 1, sub-s. 1, of the Sunday Entertainments Act 1932 (1); but the licence was granted subject to a condition that "no children under the age of fifteen years shall be admitted to any entertainment whether accompanied by an adult or not." The plaintiffs brought an action for a declaration that the condition was *ultra vires* and unreasonable. The application was dismissed. On appeal, the King's Bench Division held that the local authority had not acted unreasonably or *ultra vires* in imposing that condition. Lord Greene MR at pp. 228-229 said:

A ... The plaintiffs' contention is based, in my opinion, on a misconception as to the effect of this Act in granting this discretionary power to local authorities. The courts must always, I think, remember this: first, we are dealing with not a judicial act, but an executive act; secondly, the conditions which, under the exercise of that executive act, may be imposed are in terms, so far as language goes, put within the discretion of the local authority without limitation. Thirdly, the statute provides no appeal from the decision of the local authority.

What, then, is the power of the courts? They can only interfere with an act of executive authority if it be shown that the authority has contravened the law. It is for those who assert that the local authority has contravened the law to establish that proposition. On the face of it, a condition of the kind imposed in this case is perfectly lawful. It is not to be assumed *prima facie* that responsible bodies like the local authority in this case will exceed their powers; but the court, whenever it is alleged that the local authority have contravened the law, must not substitute itself for that authority. It is only concerned with seeing whether or not the proposition is made good. When an executive discretion is entrusted by Parliament to a body such as the local authority in this case, what appears to be an exercise of that discretion can only be challenged in the courts in a strictly limited class of case. As I have said, it must always be remembered that the court is not a court of appeal. When discretion of this kind is granted the law recognizes certain principles upon which that discretion must be exercised, but within the four corners of those principles the discretion, in my opinion, is an absolute one and cannot be questioned in any court of law. What then are those principles? They are well understood. They are principles which the court looks to in considering any question of discretion of this kind. The exercise of such a discretion must be a real exercise of the discretion. If, in the statute conferring the discretion, there is to be found expressly or by implication matters which the authority exercising the discretion ought to have regard to, then in exercising the discretion it must have regard to those matters. Conversely, if the nature of the subject-matter and the general interpretation of the Act make it clear that certain matters would not be germane to the matter in question, the authority must disregard those irrelevant collateral matters. There have been in the cases expressions used relating to the sort of things that authorities must not do, not merely in cases under the Cinematograph Act but, generally speaking, under other cases where the powers of local authorities came to be considered. I am not sure myself whether the permissible grounds of attack cannot be defined under a single head. It has been perhaps a little bit

confusing to find a series of grounds set out. Bad faith, dishonesty – those of course, stand by themselves – unreasonableness, attention given to extraneous circumstances, disregard of public policy and things like that have all been referred to, according to the facts of individual cases, as being matters which are relevant to the question. If they cannot all be confined under one head, they at any rate, I think, overlap to a very great extent. For instance, we have heard in this case a great deal about the meaning of the word "unreasonable".

It is true the discretion must be exercised reasonably. Now what does that mean? Lawyers familiar with the phraseology commonly used in relation to exercise of statutory discretions often use the word "unreasonable" in a rather comprehensive sense. It has frequently been used and is frequently used as a general description of the things that must not be done. For instance, a person entrusted with a discretion must, so to speak, direct himself properly in law. He must call his own attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to what he has to consider. If he does not obey those rules, he may truly be said, and often is said, to be acting "unreasonably". Similarly, there may be something so absurd that no sensible person could ever dream that it lay within the powers of the authority. Warrington LJ in *Short v. Poole Corporation* (1) gave the example of the red-haired teacher, dismissed because she had red hair. That is unreasonable in one sense. In another sense it is taking into consideration extraneous matters. It is so unreasonable that it might almost be described as being done in bad faith; and, in fact, all these things run into one another.

At pp. 230-234, Lord Greene MR said:

.... It is clear that the local authority are entrusted by Parliament with the decision on a matter which the knowledge and experience of that authority can best be trusted to deal with. The subject-matter with which the condition deals is one relevant for its consideration. They have considered it and come to a decision upon it. It is true to say that, if a decision on a competent matter is so unreasonable that no reasonable authority could ever have come to it, then the courts can interfere. That, I think, is quite right; but to prove a case of that kind would require something overwhelming, and , in this case, the facts do not come anywhere near anything of that kind. I think Mr. Gallop in the end agreed that his proposition that the decision of the local authority can be upset if it is proved to be unreasonable, really meant that it must be proved to be unreasonable in the sense that the court considers it to be a decision that no reasonable body could have

A come to. It is not what the court considers unreasonable, a different thing altogether. If it is what the court considers unreasonable, the court may very well have different views to that of a local authority on matters of high public policy of this kind. Some courts might think that no children ought to be admitted on Sundays at all, some courts might think the reverse, and all over the country I have no doubt on a thing of that sort honest and sincere people hold different views. The effect of the legislation is not to set up the court as an arbiter of the correctness of one view over another. It is the local authority that are set in that position and, provided they act, as they have acted, within the four corners of their jurisdiction, this court, in my opinion, cannot interfere.

…

I do not think I need take up time by referring to other authorities, but I might say this in conclusion. An early case under the Cinematograph Act, 1909, much discussed before us, was *Theatre de Luxe (Halifax) Ld. v. Gledhill* (1). That was a decision of a Divisional Court as to the legality of a condition imposed under the Act to the following effect: "Children under fourteen years of age shall not be allowed to enter into or be in the licensed premises after the hour of 9 p.m. unaccompanied by a parent or guardian. No child under the age of ten years shall be allowed in the licensed premises under any circumstances after 9 p.m." That case was heard by a Divisional Court of the King's Bench Division, consisting of Lush, Rowlatt and Atkin JJ. The majority, consisting of Lush and Rowlatt JJ. held that the condition was *ultra vires* as there was no connexion, as the headnote says, between the ground upon which the condition was imposed, namely, regard for the health and welfare of young children generally, and the subject-matter of the licence, namely, the use of the premises for the giving of cinematograph exhibitions." That case is one which, I think, I am right in saying has never been referred to with approval, but often referred to with disapproval, though it has never been expressly overruled. I myself take the view that the decision of the majority in that case puts much too narrow a construction upon the licensing power given by that Act, which, of course, is not the same Act as we have to consider here. Atkin J on the other hand, delivered a dissenting judgment in which he expressed the opinion that the power to impose conditions was nothing like so restricted as the majority had thought. Quoting again from the headnote, his opinion was "that the conditions must be (1) reasonable; (2) in respect of the use of the licensed premises; (3) in the public interest. Subject to that restriction there is no fetter upon the power of the licensing authority." If I may venture to express my own opinion about

that, I think that Atkin J was right in considering that the restrictions on the power of imposing conditions were nothing like so broad as the majority thought, but I am not sure that his language may not perhaps be read in rather a different sense from that which I think he must have intended. I do not find in the language that he used any justification for thinking that it is for the court to decide on the question of reasonableness rather than the local authority. I do not read him as in any way dissenting from the view which I have ventured to express, that the task of the court is not to decide what it thinks is reasonable, but to decide whether what is prima facie within the power of the local authority is a condition which no reasonable authority, acting within the four corners of their jurisdiction, could have decided to impose. Similarly, when he refers to the public interest, I do not read him as saying more than that the public interest is a proper and legitimate thing which the council or the licensing authority can and ought to have in mind. He certainly does not suggest anywhere that the court is entitled to set up its view of the public interest against the view of the local authority. Once the local authority have properly taken into consideration a matter of public interest such as, in the present case, the moral and physical health of children, there is, it seems to me, nothing in what Atkin J says to suggest that the court could interfere with a decision because it took a different view as to what was in the public interest. It is obviously a subject on which different minds may have different views. I do not read him as saying any more than that the local authority can and should take that matter into account in coming to their decision.

In the result, this appeal must be dismissed. I do not wish to repeat myself but I will summarize once again the principle applicable. The court is entitled to investigate the action of the local authority with a view to seeing whether they have taken into account matters which they ought not to take into account, or, conversely, have refused to take into account or neglected to take into account matters which they ought to take into account. Once that question is answered in favour of the local authority, it may be still possible to say that, although the local authority have kept within the four corners of the matter which they ought to consider, they have nevertheless come to a conclusion so unreasonable that no reasonable authority could ever have come to it. In such a case, again, I think the court can interfere. The power of the court to interfere in each case is not as an appellate authority to override a decision of the local authority, but as a judicial authority which is concerned, and concerned only, to see whether the local authority have contravened the law by acting in excess of the powers which Parliament has confided in them. …

[16] The principle in *Wednesbury* was reiterated in the House of Lords in *Puhlhofer & Anor v. Hillingdon London Borough Council* [1986] 1 AC 484 HL where at p. 518 Lord Brightman said:

> In the instant case the *bona fides* of the borough is not in dispute. On the facts in evidence, it is in my opinion plain that the council were entitled to find that the applicants were not homeless for the purposes of the Homeless Persons Act because they had accomodation within the ordinary meaning of that expression.
>
> My Lords, I am troubled at the prolific use of judicial review for the purpose of challenging the performance by local authorities of their functions under the Act of 1977. Parliament intended the local authority to be the judge of fact. The Act abounds with the formula when, or if, the housing authority are satisfied as to this, or that, or have reason to believe this, or that. Although the action or inaction of a local authority is clearly susceptible to judicial review where they have misconstrued the Act, or abused their powers or otherwise acted perversely, I think that great restraint should be exercised in giving leave to proceed by judicial review. The plight of the homeless is a desperate one, and the plight of the applicants in the present case commands the deepest sympathy. But it is not, in my opinion, appropriate that the remedy of judicial review, which is a discretionary remedy, should be made use of to monitor the actions of local authorities under the Act save in the exceptional case. The ground upon which the courts will review the exercise of an administrative discretion is abuse of power – eg, bad faith, a mistake in construing the limits of the power, a procedural irregularity, or unreasonableness in the Wednesbury sense – unreasonableness verging on an absurdity: see the speech of Lord Scarman in *Reg. v. Secretary of State for the Environment, Ex parte Nottinghamshire County Council* [1986] AC 240, 247-248. Where the existence or non-existence of a fact is left to the judgment and discretion of a public body and that fact involves a broad spectrum ranging from the obvious to the debatable to the just conceivable, it is the duty of the court to leave the decision of that fact to the public body to whom Parliament has entrusted the decision-making power save in a case where it is obvious that the public body consciously or unconsciously, are acting perversely.

[17] The above decisions make it very clear that where a statute gives the power to an authority and the authority exercises that power, the power could only be challenged by showing bad faith, mistake in construing the limits of the power, a procedural irregularity or unreasonableness. In the present appeal, the

appellant is empowered to fix the "fee". The respondent only raised the issue of actual costs or disbursements of correspondences and notices. In their submission before us and in the court below, we could not find anything to show that the fixed "fee" was made in bad faith, mistake in construing the limits of the power or unreasonable. We find no merit in the contention of the respondent.

[18] For the above reasons, we find that the learned trial judge erred in allowing the application by the respondent. We are of the view that there is no merit in the respondent's application and it should have been dismissed. We hereby allow the appeal by the appellant with costs here and below. The order of the learned judge is set aside. Anyway, as pointed out earlier, the penalties imposed should be varied in that penalty of 10% is imposed only for rates and arrears commencing 1/92. As for rates and arrears pre 1/92 the penalty remains at 2% until fully paid. The deposit is to be refunded to the appellant.